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JKP SDN BHD v. ANAS CONSTRUCTION SDN BHD

HIGH COURT MALAYA, PULAU PINANG
ANAND PONNUDURAI J
[SUIT NO: PA-22NCVC-32-02-2022]
7 DECEMBER 2022

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Abstract – *An arbitration agreement is not rendered inoperative merely on account of one party failing to pay further deposit. If one party refuses to make payment of the advance deposit, the arbitration would continue but that party would only be entitled to defend its claim and not pursue further ie, counterclaim, adding third party.*

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ARBITRATION: *Agreement – Reference of dispute – Building contract – Disputes referred to arbitration – Parties participated actively in arbitration proceedings – One party refused to pay share of advance deposit – Other party requested for termination of arbitration proceedings – Whether non-payment of arbitrator's fees rendered arbitration clause inoperative or incapable of being performed – Arbitration Act 2005, s. 10*

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CIVIL PROCEDURE: *Striking out – Application for – Suit arising from building works dispute – Contract entered into by parties contained arbitration clause – Dispute arising from and/or related to contract to be referred to and be determined by arbitration – Whether dispute ought to be referred to arbitration – Whether suit ought to be struck out – Rules of Court 2012, O. 18 r. 19*

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CIVIL PROCEDURE: *Stay of proceedings – Application for – Claim arising from building works dispute – Contract entered into by parties contained arbitration clause – Dispute arising from and/or related to contract to be referred to and be determined by arbitration – Whether dispute ought to be referred to arbitration – Whether suit ought to be stayed pending arbitration – Rules of Court 2012, O. 18 r. 19*

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The defendant was appointed by the plaintiff as the main contractor for the main building works for a project. The plaintiff claimed against the defendant, at the High Court, alleging that the ready mixed concrete used by the defendant in the project was not in accordance with the specifications stipulated in the contract, which compromised the safety of the project ('first civil suit'). The defendant objected to the first civil suit and argued that the contract entered into, under cl. 66, provided that if there was any dispute arising from and/or related to the contract, the same shall be referred to and be determined by arbitration ('arbitration clause'). The plaintiff acknowledged the arbitration clause, discontinued the first civil suit and referred the dispute to arbitration. The parties actively participated in the arbitration proceedings and made payments of their respective share towards provisional advance deposit. The defendant counterclaimed against the plaintiff and applied to add a third party. When the Asian International

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Arbitration Centre ('AIAC') requested a second advance deposit, the plaintiff paid its share but the defendant refused to pay its share and requested the plaintiff to pay the same on their behalf. The plaintiff informed the arbitrator that it would not effect payment of the further deposit payable by the defendant and requested the termination of the arbitration proceedings. The arbitrator replied that if the defendant refused to make the payment of the advance deposit, the arbitration would continue as directed but the defendant would only be entitled to defend its claim and not pursue any counterclaim and, accordingly, the third party would not be able to participate in the proceedings ('arbitrator's response'). Notwithstanding the arbitrator's response, the plaintiff maintained their position that they would not pay the defendant's share of the further deposit and, again, requested a termination of the arbitration proceedings. The arbitrator proceeded to terminate the entire proceedings. Hence, the present civil suit. The defendant then applied to strike out the present suit or, alternatively, stay the same pending arbitration ('encl. 6'). The issues that arose for adjudication were: (i) whether the non-payment of the arbitrator's fees by the defendant rendered the arbitration clause inoperative or incapable of being performed; and (ii) whether the defendant had taken a step in the proceedings or submitted to the jurisdiction of the court by filing encl. 6, which included a prayer to strike out the plaintiffs' claim.

Held (staying proceedings pending arbitration):

(1) The fact that the arbitrator had ruled that the plaintiff was very much entitled to proceed with their claim in arbitration, despite the non-payment by the defendant, rendered the plaintiff's argument of the arbitration clause becoming inoperative being one bereft of merit. There was nothing in the Arbitration Act 2005 or the AIAC Arbitration Rules 2018 to the effect that mere non-payment rendered an arbitration agreement inoperative. Furthermore, the defendant had not only paid the initial deposit but had actively participated in the arbitration proceedings and was very responsive at all material times. There was no clear indication from the defendant that it was abandoning its intention to proceed with the arbitration. At best, the only indication was that the defendant was prepared to forego pursuing their counterclaim and the third-party claim/indemnity claim by electing not to make the second further deposit. (paras 27, 28 & 36)

(2) The filing of encl. 6 only sought for the writ to be struck out or stayed on the sole ground that the court lacked jurisdiction due to the arbitration agreement. In the affidavit in support of encl. 6, the defendant was unceasingly challenging the jurisdiction of the court. The only intention that was so consistently evinced by the defendant was that they were not prepared to proceed with the present suit or to abandon their right to have the dispute disposed of by arbitration. (para 53)

Case(s) referred to:

Comos Industry Solution GMBH v. Jacob & Toralf Consulting Letrikon Sdn Bhd & Ors [2011] 1 LNS 1770 CA ***(refd)***

Kebabangan Petroleum Operating Company Sdn Bhd v. Mikuni (M) Sdn Bhd & Ors [2021] 7 CLJ 544 CA ***(dist)***

L Capital Jones Ltd and another v. Maniach Pte Ltd [2017] SGCA 63 ***(dist)***

Mesra Budi Sdn Bhd lwn. Lembaga Kemajuan Tanah Persekutuan (FELDA) [2017] 1 LNS 1920 HC ***(refd)***

Pacific Inter-Link Sdn Bhd v. EPA Management Sdn Bhd [2016] 6 CLJ 9 CA ***(refd)***

Padda Gurtaj Singh v. Tune Talk Sdn Bhd & Ors And Another Appeal [2022] 5 CLJ 335 CA ***(refd)***

Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC ***(refd)***

Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal [2020] 4 CLJ 301 FC ***(refd)***

Zaq Construction Sdn Bhd & Anor v. Putrajaya Holdings Sdn Bhd [2014] 4 CLJ 895 HC ***(refd)***

Legislation referred to:

AIAC Arbitration Rules 2018, rr. 14(3), (7)
Arbitration Act 2005, s. 10
Rules of Court 2012, O. 18 r. 19

For the plaintiff - Mahinder Singh & Abd Fareed Abd Gafoor; M/s Fareed & Co
For the defendant - Ong Yu Shin & Lai Chian Loong; M/s The Chambers of Yu Shin Ong

Reported by Najib Tamby

JUDGMENT

Anand Ponnudurai J:

Introduction

[1] This is a case where parties had entered a contract which contained a clause which obligated them to refer any dispute or differences to arbitration. Disputes arose and whilst the plaintiff filed a claim in this court, the defendant then filed a notice of application *vide* encl. 6 to strike out the present claim or alternatively to stay the same pending arbitration.

[2] It is not disputed that there were proceedings initially before a learned arbitrator but who had then terminated such arbitration upon request by the plaintiff on account of the defendant failing to make a second provisional payment towards the learned arbitrator's fees.

[3] There were two core issues that arose in this present application to wit:

(i) did the non-payment of the learned arbitrator's fees by the defendant render the arbitration clause inoperative or incapable of being performed; and

(ii) has the defendant taken a step in the proceedings or submitted to the jurisdiction of this court by filing a notice of application *vide* encl. 6 which included a prayer to strike out the plaintiff's claim pursuant to O. 18 r. 19 of the Rules of Court 2012 (hereinafter referred to as the "ROC 2012").

[4] I will hereinbelow set out the material background facts and the rival contentions and thereafter analyse the same in order to determine if the defendant's present application is with merits or otherwise.

[5] For ease of reference, I will hereinafter refer to the plaintiff and the defendant as "JKP" and "Anas" respectively.

The Background Facts

[6] The background facts are largely undisputed and have been set out in the affidavits filed by the parties herein. They can be summarised as follows:

(i) Anas was appointed by JKP as the main contractor for the main building works for a project known as 'Cadangan Membina Dan Menyiapkan Satu (1) Blok Pangsapuri 24 Tingkat Rumah Pangsa Kos Sederhana (382 Unit) Di Atas Tanah Tebusguna Kerajaan, Kampung Pisang Awak, Seksyen 4, Bandar Jelutong, Daerah Timur Laut, Pulau Pinang' ("project") for the contract sum of RM67,994,500 (exclusive of 6% Goods and Service Tax) pursuant to an acceptance of tender dated 19 November 2014;

(ii) amongst the construction contract entered into, and binding on both parties, including the acceptance of tender and the Standard Form of Contract P.W.D Form 203A (Rev. 1/2010) dated 9 April 2015 (together with all documents mentioned therein, collectively known as "the said contract");

(iii) it is undisputed that the said contract provides *vide* cl. 66 that if there is any dispute arising from and/or related to the said contract, the same shall be referred to and be determined by arbitration (hereinafter referred to as "the arbitration clause");

(iv) neither JKP nor Anas had raised any objections and/or disputes to the inclusion of this particular arbitration clause nor were there any amendments made to the same. To date, there is no written agreement or consent given by either party to waive the enforceability of this arbitration clause;

(v) a dispute thereafter arose in relation to the cement used by Anas in the project.

First Civil Suit

(vi) On 1 July 2019, JKP commenced a civil suit against Anas *vide* Penang High Court, Civil Suit No. PA-22NCvC-158-07-2019 (hereinafter referred to as the "first civil suit"), *inter alia*, alleging that the Ready Mixed Concrete used by Anas in the project was not in accordance with the specification stipulated in the contract which compromised the safety of the project and claimed a sum of RM89,322,011.50.

(vii) Upon receiving the relevant cause papers of the first civil suit, Anas raised its objections towards the commencement of the first civil suit in the civil court based on the existence and validity of the said arbitration clause which JKP duly acknowledged and JKP subsequently discontinued the first civil suit on 17 July 2019.

Arbitration No. 765

Subsequent to the objections of Anas and pursuant to the said arbitration clause, JKP referred the dispute to Arbitration whereby the proceedings were registered by the AIAC as Arbitration No. 765.

(viii) The subject matters raised in Arbitration No. 765 were similar to those raised in the first civil suit, and to those raised now in this suit.

(ix) Several preliminary meetings were conducted between parties with the learned arbitrator, where the learned arbitrator gave directions to parties in relation to the arbitration proceedings.

(x) It appears that both parties had actively participated in the arbitration proceedings with the filing of the relevant cause papers, *etc.*

(xi) The proceedings that took place at the arbitration are pertinent to state briefly and they are as follows:

(a) several preliminary meetings were conducted where directions were given by the learned arbitrator to the parties. Both parties participated and complied with the directions given, *ie*:

(1) parties paid the first provisional advance deposit to AIAC;

(2) JKP filed its points of claim;

(3) Anas filed an application to name Strong Mixed Concrete Sdn Bhd ("SMC") as a third party in the arbitration proceeding;

(4) affidavits and submissions were filed by JKP, SMC and Anas, and decision was delivered by the learned arbitrator where SMC was directed to be added as third party in the arbitration;

(5) Anas then filed its points of reply and counterclaim against JKP and indemnity against SMC.

(b) A second provisional advance deposit was then requested by the learned arbitrator and the issue arose when Anas took the position that it would not pay such second provisional advance deposit. Upon such position taken by Anas, JKP had several options, as provided under rr. 14(3) and 14(7) AIAC Arbitration Rules 2018, and pursuant to the learned arbitrator's directions *vide* email dated 23 August 2021:

(1) JKP could pay Anas's portion of the second provisional advance deposit, and the entire arbitration proceedings shall proceed; or

(2) JKP to proceed with its claim against Anas, whereby Anas will only be entitled to defend its claim without being allowed to proceed with its counterclaim against JKP and indemnity claim against SMC. An excerpt of the said email from the learned arbitrator dated 23 August 2021 is reproduced below as follows:

> If the respondent still wishes to take the stand that the if refuses to make payment of the advance deposit, this arbitration will proceed as directed but the respondent will only be entitled to defend its claim and not pursue any counterclaim and accordingly the third party will not be able to participate in the proceedings.

(3) Either way, it appears that JKP could and was entitled to proceed to have its claim heard and disposed off in Arbitration No. 765.

(4) Anas having opted not to pay its portion of the second provisional advance deposit as requested by AIAC faced the risk of not being able to proceed with its counterclaim against JKP and indemnity claim against SMC should JKP decide not to pay for Anas's portion.

(5) Having been made clear of these directions and options to JKP by the learned arbitrator, JKP still refused to pay Anas's portion of the second preliminary advanced deposit and sought to terminate the entire Arbitration No. 765 of their own volition.

(6) It is apt to reproduce the relevant paragraph of JKP's solicitors' letter dated 25 June 2021 and 8 September 2021 as follows:

> Our Client has instructed us to state that it will not effect payment of the further deposits that is payable by the Respondent. The Claimant considers the wilful refusal by the Respondent to pay its share of the required deposit as totally unreasonable, for the reasons, *inter alia*, set out in paragraph 3 below. In the circumstances, the Claimant will be obliged if you would, after consultation with the Director, order the termination of the arbitral, proceedings herein forthwith including a consequent direction that until such an order is made all further pleadings that are due to be filed, *inter alia*, by the Claimant, in the instant arbitration proceedings, be and are hereby dispensed with or a suitable extension of time is granted accordingly. The request for the aforesaid order and direction is made without prejudice to the Claimant's strict legal rights against the Respondent including but not limited to the Claimant's right to file legal proceedings in Court against the Respondent in respect of the matters, *inter alia*, which are the subject matter of the arbitration proceedings.
>
> In the circumstances, we reiterate that the Arbitration agreement has become inoperative and thus seek the termination of the Arbitration proceedings to enable our client, *inter alia*, to file appropriate legal proceedings against the Respondent without any further delay.

(7) Pursuant to JKP's request to terminate the arbitration proceedings, the learned arbitrator *vide* email dated 25 October 2021 terminated the entire arbitration proceedings.

(8) JKP then filed this present civil suit on 16 February 2021. Anas had filed a memorandum of appearance on 28 February 2021 and had at the very outset *vide* their letter dated 1 March 2022 informed JKP's solicitors that they objected to the commencement of this present civil suit and that the arbitral forum was the proper forum to decide the dispute pursuant to cl. 66 of the said contract. The letter also stated that Anas would be filing an application to strike out or for a stay of proceedings of this present civil suit.

(9) Anas then filed this notice of application *vide* encl. 6 dated 23 March 2022.

The Defendant's Application In Enclosure 6

[7] As one of the main issues is whether Anas had submitted to the jurisdiction of this court by virtue of filing the notice of application under encl. 6, in my view, it is apt to set out encl. 6 *in verbatim* for its full effect as follows:

DALAM MAHKAMAH TINGGI GEORGETOWN
DALAM NEGERI PULAU PINANG
GUAMAN SIVIL NO: PA-22NCvC-32-02/2022

ANTARA

JKP SDN BHD
(No. Syarikat: 350606-W) ... PLAINTIF

DAN

ANAS CONSTRUCTIONS SDN BHD
(No. Syarikat: 626517-P) ... DEFENDAN

NOTIS PERMOHONAN

(Untuk membatalkan atau menggantungkan tindakan Plaintif di bawah Aturan 12 Kaedah 10(l)(a) dan (g) dan Aturan 18 Kaedah 19(l)(a), (b), (c) atau (d), Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012, Seksyen 10 Akta Timbang Tara 2005)

BENARKAN SEMUA PIHAK yang berkenaan hadir di hadapan Hakim/ Penolong Kanan Pendaftar dalam kamar pada 25-MAR-2022 9:00 AM 2022 pada pukul ... pagi/petang bagi pendengaran suatu permohonan oleh Defendan yang dinamakan di atas selaras dengan Aturan 12 Kaedah 10(l)(a) dan (g), Aturan 18 Kaedah 19(l)(a), (b), (c) atau (d), Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012 dan/atau Seksyen 10 Akta Timbang Tara 2005 dan/atau bidangkuasa sedia ada Mahkamah yang Mulia ini untuk perintah-perintah seperti berikut:

1. Kebenaran diberikan kepada Defendan untuk membuat permohonan ini;
2. Writ Saman dan Pernyataan Tuntutan bertarikh 15hb Februari 2022 terhadap Defendan dalam tindakan di sini dibatalkan;
3. Kesemua prosiding di dalam tindakan ini digantung (kecuali permohonan ini) sehingga pendengaran dan pelupusan penuh permohonan ini;
4. Secara alternatifnya, segala prosiding dalam tindakan ini digantung dan dirujuk oleh Plaintif kepada prosiding timbang tara ('Arbirtation') menurut Seksyen 10 Akta Timbang Tara 2005 sehingga dan selepas prosiding timbang tara tersebut diputuskan dan dilupuskan secara muktamad dan penuh;

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5. Kos permohonan ini dibayar oleh Plaintif dengan serta-merta kepada Defendan atas dasar indemniti penuh; dan

6. Apa-apa relif selanjutnya dan/atau yang lain yang Mahkamah yang Mulia ini fikir patut dan suai.

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The Applicable Law

[8] It is pertinent to note that the present application for a stay of proceedings pending arbitration was premised on s. 10 of the Arbitration Act 2005. In this respect, I find the High Court case of *Zaq Construction Sdn Bhd & Anor v. Putrajaya Holdings Sdn Bhd* [2014] 4 CLJ 895 instructive where Mary Lim J (as Her Ladyship then was) held as follows:

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(1) The language in s. 10(1) is couched in mandatory terms with the use of the word "shall". Where the terms of s. 10(1) are met, the court is obliged to stay court proceedings and refer the parties to arbitration. The only exception to this is provided within s. 10(1) itself and that is where the court finds the "agreement to be null and void, inoperative or incapable of being performed". (para 26)

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(2) As for the test to be applied when dealing with an application for stay pending arbitration, s. 10(1) requires the court to first and foremost examine whether the "proceedings" in court are "brought in respect of a matter which is the subject of an arbitration agreement". *If the proceedings are indeed brought in respect of a matter which the parties have agreed should be resolved by arbitration, then the court is obliged to stay the proceedings and "refer the parties to arbitration".* (paras 35 & 36)

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(3) *Arbitration agreements are construed broadly so as to give effect to the contractual choice of the parties as opposed to defeating the agreement: unless of course, that choice offends the law. A claim premised on a failure to pay according to the final account was a matter which fell well within the terms of the arbitration agreement.* (paras 47 & 49)

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(4) For the purpose of s. 10, the defendant tvas not required to show that it had a defence of merit or even an arguable claim before the arbitral tribunal. The quality of the defence was not a relevant consideration in the present proceedings. The court is not required to evaluate let alone determine the merits of the plaintiffs' claim or the defendant's defence when deciding whether to grant a stay. (para 61)

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(5) The plaintiffs' claim and the defendant's claim of a set-off or deduction were matters that fell within the ambit of the arbitration agreement in that it was related to "the construction of this contract" or "any matter or thing of whatever nature arising under this contract". That was sufficient for the present application for stay. (para 62)

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(8) There was no evidence of the defendant having taken a step in these proceedings such as to disentitle them to the order of stay. The matters which occurred before the learned Deputy Registrar during case management cannot be considered as within the meaning of "steps" in

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s. 10. *Those steps must be definitive, conscious and deliberate steps taken in respect of participating in the court proceedings. Attending case managements before the Deputy Registrar cannot be regarded as within that meaning.* (para 100)
(emphasis added)

[9] Reference is also made to the Federal Court case of *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd And Another Appeal* [2020] 4 CLJ 301; [2020] 3 MLJ 545 where Nallini Pathmanathan FCJ held as follows:

[44] *It is evident from the foregoing that any dispute or difference arising in respect of any matter arising under the governing contract is to be referred to arbitration.* Clause 34 effectively provides that arbitration is the exclusive dispute resolution choice of the parties.

[45] The clause read in its entirety warrants the construction that a dispute relating to a claim for monies certified, countered by a defence or set off of defective works, 'shall' be referred to arbitration. *The use of the word 'shall' underscores the mandatory nature of the agreement between the parties. The fact that the dispute falls within the scope of the arbitration clause further fortifies this conclusion.*

[46] *It therefore follows that unless the arbitration agreement in cl. 34 is null, void. Inoperable or incapable of being performed, all disputes arising under the governing contract are to be referred to arbitration.*

...

[48] The plain answer can only be that it makes no difference whatsoever. There are several reasons for this.

(i) firstly, s. 10 stipulates that the court can act only as stipulated under the section. When analysed s. 10 only allows consideration of the following matters:

(a) that there subsists an agreement to arbitrate;

(b) that no step has been taken in court proceedings (which is not in issue here);

(c) that the arbitration agreement is not null, void, inoperative or incapable of being performed.

Therefore from the statutory perspective, even when a judgment in default has been procured, s. 10 remains applicable. This in turn means that the court is bound to consider the matters set out in (a), (b) and (c) notwithstanding the judgment in default. This is particularly so when there are active efforts being made to set aside the judgment in default of appearance such that the matters in dispute can be ventilated fully by way of arbitration;

(ii) the second reason why the judgment in default cannot or ought not to act as a bar to arbitration is that the contractor, by initiating court proceedings, has effectively breached the arbitration agreement. The commencement of court proceedings or litigation amounts to a breach of the arbitration agreement as contained in cl. 34.

The breach of the arbitration agreement however remains just that, namely a breach or even a repudiatory breach, but unless and until such a breach is accepted by the innocent party, namely the employer, the contract remains valid and subsisting (see s. 65 of the Contracts Act 1950).

In the instant case the 'innocent party' namely the employer has, by conduct clearly evinced an intention to be bound by the contract namely to have the dispute referred to arbitration. This is evident from the application to set aside the judgment in default followed by the application for a stay of proceedings. As such, the contractor cannot then rely on its own breach to seek to impugn or subordinate the agreement to arbitrate. Neither does the agreement to arbitrate stand voided or inoperative or incapable of being performed;

(iii) thirdly, if the commencement of litigation by the contractor in breach of the agreement to arbitrate in cl. 34 is condoned, it would effectively render that agreement nugatory. It would be open to parties to an agreement to stipulate at the outset that the sole and exclusive mode of dispute resolution is arbitration and then renege on the same, in the event of a dispute, with impunity. The intention of the parties at the point in time when the contract was concluded would be effectively undermined;

(iv) *fourthly, the employer's application to stay the court proceedings pending arbitration raised a jurisdictional point which the court was bound to consider.* This could only have been done if the Court of Appeal had considered the form and substance of the appeals in totality and appreciated the significance of both applications. While both applications were indeed separate, *ie* the setting aside of the judgment in default and the stay pending arbitration, it is crystal clear that the two applications (and thus appeals) were inextricably intertwined. It was incumbent upon the Court of Appeal to consider the effect of hearing the first appeal relating to the setting aside *in vacuo*, as it were, without even mentioning or addressing the stay pending proceedings. That effect was to ignore the existence of an arbitration agreement and to exclude the application s. 10 of the Arbitration Act 2005. The Court of Appeal missed an essential jurisdictional issue, namely whether the dispute ought to be dealt with by way of litigation or arbitration.

This was a relevant consideration even when determining the appeal relating to the setting aside of the judgment in default because the fact of the subsistence of the arbitration agreement, a jurisdictional issue, amounted to a matter warranting further investigation. In other words it afforded a defence on the merits (see *Evans v. Bartlam* [1937] AC 473: [1937] 2 All ER 646: [1937] 53 TLR 689 and *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 MLJ 312: [1994] 1 CLJ 328).

[49] In all these circumstances *it therefore remained incumbent upon the court, notwithstanding the initiation of the civil suit by the contractor, to carry out its function as set out in s. 10, namely to refer the dispute to arbitration unless the arbitration agreement is null, void or inoperative.* The court carries out its prescribed statutory duty by ascertaining:

(i) whether there is an agreement to arbitrate the dispute; A

(ii) whether the arbitration agreement is valid or null, void or inoperative.

Having done so, the following consequences ensue from s. 10:

(i) if there is a valid agreement to arbitrate then the court must refer the dispute to arbitration; and B

(ii) if the agreement to arbitrate is null, void or inoperative then the matter/suit need not be referred to arbitration. (emphasis added)

[10] Further, the case of *Tindak Murni* (*supra*) was followed by the Court of Appeal in a recent case of *Padda Gurtaj Singh v. Tune Talk Sdn Bhd & Ors And Another Appeal* [2022] 5 CLJ 335 where See Mee Chun JCA held as follows: C

(1) The scope and application of s. 10(1) of the AA 2005 were well-established and the court could do no better than to refer to *Tindak Murni* and *Press Metal Sarawak. The requirements of s. 10(1) of the AA 2005 have been met-valid arbitration agreement in the form of cl. 16; arbitration agreement was not null and void, inapplicable, inoperative or incapable of being performed and no steps have been taken in the proceedings. The question of whether there was a dispute in existence or not was to be decided by arbitration. A stay ought to be granted. There being an agreement to arbitrate, the invocation of it could not depend on the absence of a written notice*. (paras 39, 54 & 57) D E

(2) There were many cases from various jurisdictions that have allowed stay applications on disputes that came within the scope of an arbitration agreement despite the existence of distinct statutory provisions. *Arbitration clauses should be generously construed and parties must be held to their original bargain. There was. therefore. a presumption of arbitrability and the applicable provision, if any, was s. 4(2) of the AA 2005. The exception to arbitrability would therefore be if interests of wider parties, such as creditors, are involved, where Parliament intended to exclude arbitration or an inherent conflict between arbitration and public policy considerations*. (paras 72, 77 & 81) (emphasis added) F

[11] In distilling the principles set out in the cases above, the requirements to be fulfilled and considered by the court in determining such an application includes: G

(i) whether there subsists an agreement to arbitrate;

(ii) whether the disputes raised are the subject of an arbitration agreement; H

(iii) whether any steps have been taken in court proceedings; and

(iv) whether the arbitration agreement is null and void, inoperative or incapable of being performed.

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[12] From the facts of this case, it is beyond per adventure that there is an agreement to arbitrate and that a dispute exists between the parties. The fact that the disputes arose from and are the subject of the contract is also not an issue. In fact, a perusal of JKP's claim in Arbitration No. 765 and their claim in the statement of claim herein will reveal that the claim is almost identical. It is trite law that at this stage, the court is not tasked to consider whether there is a *bona fide* dispute but only needs to consider if there is a *prima facie* dispute. (See the cases of *Pacific Inter-Link Sdn Bhd v. EPA Management Sdn Bhd* [2016] 6 CLJ 9; [2016] 6 MLJ 529 and *Mesra Budi Sdn Bhd lwn. Lembaga Kemajuan Tanah Persekutuan (FELDA)* [2017] 1 LNS 1920; [2017] MLJU 1971), I am satisfied that *prima facie*, a dispute exists between the parties which falls within the ambit of the said arbitration clause.

[13] The two issues to be decided as highlighted earlier are whether the arbitration agreement has become inoperative and whether Anas has submitted to the jurisdiction of this court. An affirmative answer to either question should result in a dismissal of the application in encl. 6.

The Rival Contentions

[14] JKP in opposing the application under encl. 6 contends as follows:

(i) that the arbitration agreement has become inoperative owing to Anas's failure to pay its share of the further deposit as requested by AIAC; and

(ii) that by filing an application (encl. 6) pursuant to O. 18 r. 19 of ROC 2012, the alternative prayer for a stay of proceedings is unsustainable and amounts to Anas having submitted to the jurisdiction of this court.

[15] Learned counsel for JKP relies heavily on a recent case of the Court of Appeal in *Kebabangan Petroleum Operating Co Sdn Bhd v. Mikuni (M) Sdn Bhd & Ors* [2021] 7 CLJ 544; [2021] 1 MLJ 693 to support both its contentions above.

[16] Learned counsel for Anas conversely contends that the mere non-payment of their portion of the learned Arbitrator's fees did not render the arbitration agreement inoperative. It is further contended that Anas has not taken any step in the proceedings and neither was there ever any unequivocal intention to proceed with this present civil suit and to abandon the right to have the dispute disposed of by arbitration proceedings.

[17] I will now proceed to analyse these two issues.

Issue 1 – Has The Arbitration Agreement Become Inoperative?

[18] In my considered view, the determination of this issue requires a more detailed examination of the sequence of events that led to the termination of the arbitration proceedings.

[19] As seen hereinabove, there is no dispute that the parties had actively participated in the arbitration proceedings with both parties having made payments of their respective share towards provisional advance deposit in the amount of RM77,268.15 each. Anas then filed a counterclaim against JKP. Thereafter, Anas's application to add a company called Strong Mixed Concrete Sdn Bhd (SMC) as a third party was allowed by the learned Arbitrator on second February 2021. Hearing dates were then fixed for January and March 2022 and directions were given.

[20] In the meantime, AIAC requested a further payment of RM180,117.34 from each party as a second advance deposit. JKP paid its share sometime in May 2021. Anas, however, took the that they would not pay their share and requested JKP to pay their share of the further deposit on their behalf.

[21] On 25 June 2021, JKP informed the learned arbitrator that it would not effect payment of the further deposit payable by Anas on their behalf and requested the termination of the arbitration proceedings.

[22] What is critical then is the learned arbitrator's email to the parties dated 23 August 2021 which reads as follows:

> I refer to the preliminary meeting this afternoon.
>
> I write to reiterate my direction that the Respondent is to revert on whether it intends to make payment of the advance deposits as directed by AIAC by this Friday 27 August 2021.
>
> If the Respondent still wishes to take the stand that the it refuses to make payment of the Advance Deposit, this Arbitration will proceed as directed but the Respondent will only be entitled to defend its claim and not pursue any counterclaim and accordingly the Third Party will not be able to participate in the proceedings.
>
> I will issue my further directions after hearing from the Respondent.

[23] Notwithstanding the above response from the learned arbitrator, JKP *via* letter dated 8 September 2021 maintained their position that they would not pay Anas's share of the further deposit and again requested a termination of the arbitration proceedings.

[24] On 25 October 2021, the learned arbitrator issued his email informing that he was terminating the entire arbitration proceedings.

[25] At the outset, it is to be noted that rr. 14(3) and (7) of the AIAC Arbitration Rules 2018 provide as follows:

> **Rule 14 Deposits**
>
> *In lieu* of the provisions of Article 43, the following provisions shall apply:
>
> ...

A 3. In the event that any of the Parties fails to pay such deposit, the Director shall give the other Party an opportunity to make the required payment within a specified period of time. The arbitral tribunal shall not proceed with the arbitral proceedings until such provisional advance deposit is paid in full.

B ...

7. If the required deposits are not paid in full, the Director shall give the other Party an opportunity to make the required payment within a specified period of time. If such payment is not made, the arbitral tribunal may, after consultation with the Director, order the suspension or termination of the arbitral proceedings or any part thereof.

C

[26] In appears that notwithstanding the non-payment of the further deposit by Anas, in light of the contents of the earned arbitrator's email dated 23 August 2021, JKP could easily have proceeded with their claim *via* arbitration proceedings by either paying Anas's portion of the further deposits or by requesting a termination of only a part of the said proceedings *ie*, the termination of Anas's counterclaim and third-party proceedings/ indemnity claim against SMC. JKP chose neither but instead opted to seek a termination of the entire arbitration proceedings.

D

[27] In my considered view, bearing in mind the contents of the learned arbitrator's email dated 23 August 2021 as seen above, JKP was fully entitled to proceed with its claim at the arbitration hearing fixed for January 2022. In fact, the non-payment by Anas of their portion of the further deposit appears to be to the benefit of JKP as the effect of such non-payment then disentitled Anas to pursue their counterclaim against JKP and the third-party proceedings/indemnity claim against SMC. I am unable to fathom why JKP did not just proceed with their claim but requested a termination of the entire arbitration proceedings.

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[28] Suffice for me to conclude that the fact that the learned arbitrator had ruled on 23 August 2021 that JKP was very much entitled to proceed with their claim in arbitration despite the non-payment by Anas renders their argument of the arbitration clause becoming inoperative being one bereft of merit. In this regard, I do not find anything in the Arbitration Act 2005 or the AIAC Arbitration Rules 2018 to the effect that mere non-payment renders an arbitration agreement inoperative.

G

H **[29]** In my opinion, the court has to consider the conduct of the parties on the peculiar facts of each case. To conclude as JKP urges me to rule that the mere non-payment of the fees by one party renders the entire arbitration agreement inoperative may militate against the entire framework of arbitration to uphold the bargain struck to arbitrate. Otherwise, it may lead to a situation where a party could easily circumvent the arbitration agreement by refusing to pay their portion of the deposit.

I

[30] In my considered view, on the peculiar facts of this case, to reiterate, in light of the fact that the learned arbitrator had informed parties *vide* his email dated 23 August 2021 that the arbitration would still proceed despite the non-payment by Anas, the said arbitration agreement was not rendered inoperative.

[31] Finally on this issue, as stated earlier, JKP's contention rests primarily on the recent decision of the Court of Appeal in the case of *Kebabangan Petroleum Operating Co Sdn Bhd v. Mikuni (M) Sdn Bhd & Ors* [2021] 7 CLJ 544; [2021] 1 MLJ 693. However, in my view, the facts in *Kebabangan Petroleum* (*supra*) are distinguishable.

[32] In *Kebabangan Petroleum* (*supra*), the main contracting parties had an arbitration agreement and a dispute was referred to arbitration. The KLRCA had directed the parties to pay a sum of RM55,800 each in equal shares as a provisional advance deposit. The appellant paid its portion of RM27,900 but the respondent failed to do so. The appellant then filed a civil suit against the respondent company for breach of contract as well as against four directors of the respondent for fraud. The respondents all filed an application in encl. 7 to stay the civil suit pending arbitration. Subsequent to filing encl. 7, the respondents there also filed another application *vide* encl. 24 pursuant to O. 18 r. 19 of ROC 2012 to strike out the writ. The learned High Court Judge allowed encl. 7 but dismissed encl. 24 and the civil suit was therefore stayed pending disposal of the arbitration proceedings.

[33] In allowing the appellant's appeal, the Court of Appeal in *Kebabangan Petroleum* (*supra*) held as follows:

> We unanimously allowing the appeal, setting aside the High Court's decision, and ordering the suit against the respondents to be proceeded with:
>
> (1) Mikuni's conduct in unreasonably and deliberately delaying or not paying its portion of the provisional advance deposit to KLRCA and its sheer unresponsiveness and callous disregard to the letters issued by the appellant and KLRCA had rendered the arbitration agreement between itself and the appellant inoperative. Mikuni's conduct indicated that it was disinterested and was unequivocally abandoning its right under the umbrella agreement to refer the matter to arbitration (see paras 35 & 53).

[34] As can be seen, the facts in *Kebabangan Petroleum* (*supra*) were significantly different. There, it would appear that the respondent did not pay even the first deposit and had displayed sheer unresponsiveness and had indicated that it was disinterested and was abandoning its intention to proceed with arbitration. On the facts there, such conduct was found to be sufficient to render the arbitration agreement inoperative.

[35] However, in the case at hand, quite to the contrary, the facts reveal that Anas had not only paid the initial deposit but had actively participated in the arbitration proceedings and was very responsive at all material times. In my view, there was no clear indication from Anas at all times that it was abandoning its intention to proceed with the arbitration. At best, the only indication was that they were prepared to forego pursuing their counterclaim and the third-party claim/indemnity claim by electing not to make the second further deposit.

[36] Further, unlike in *Kebabangan Petroleum* (*supra*), JKP was fully entitled to proceed with its claim in arbitration despite the non-payment by Anas.

[37] Also, in passing, another distinguishing factor that appears to have swayed the Court of Appeal in *Kebabangan Petroleum* (*supra*) to allow the appeal was the fact that the civil suit ought not to have been stayed on account of the other respondent directors who were not parties to the arbitration agreement. In the case at hand, there are no third parties in the civil suit but the parties only JKP and Anas.

[38] In conclusion on this issue, I find that the arbitration agreement was not rendered inoperative merely on account of Anas failing to pay its share of the second deposit.

Issue 2 – Was There A Step In The Proceeding?

[39] On this issue, learned counsel Dato Seri Mahinder Singh Dulku on behalf of JKP also relies on the decision of the Court of Appeal decision of *Kebabangan Petroleum* (*supra*) and submits that the application under encl. 6 should be dismissed *in limine* with the proposition that by seeking an order under O. 18 r. 19 of ROC 2012, Anas has elected to submit to the jurisdiction of this court. In *Kebabangan Petroleum* (*supra*), in concluding that the respondent there had taken a step in the proceedings by filing a subsequent application to strike out under O. 18 r. 19 of ROC 2012, Suraya Othman JCA held as follows:

> (2) The High Court judge erred in not appreciating that the application to strike out the appellant's civil suit on merits was an affirmation by the respondents of the court's jurisdiction to adjudicate their dispute with the appellant and that it constituted a step in the proceedings. The filing of the striking out application clearly evinced an unequivocal intention on the respondents' part to submit to the court's jurisdiction and to proceed with the civil suit in preference to arbitration. In their application, the respondents had prayed, first, for the suit to be struck out on merits and, alternatively, for it to be stayed. This was not consonant with s. 10 of the AA and by doing so the respondents had foreclosed any argument on their part that they had reserved their rights to arbitrate the matter (see paras 38, 41, 43 & 53).

[40] The Court of Appeal in *Kebabangan Petroleum* (*supra*) in arriving at its decision had referred to a decision of the Singapore Court of Appeal in the case of *L Capital Jones Ltd and another v. Maniach Pte Ltd* [2017] SGCA 63; [2017] 1 SLR 312 where the party there had whilst applying to stay the court proceedings in favour of arbitration, applied to strike out the action on its merits or, in the alternative, stay the proceedings in favour of arbitration. The Singapore Court of Appeal held that the striking out application was an act that signifies submission to the court's jurisdiction.

[41] However, in my view, the above two decisions were based on the fact that in the striking out applications, the applicants were seeking to strike out the claims on the merits. In *Kebabangan Petroleum* (*supra*), the Court of Appeal was of the view that the conduct of the respondent there had evinced or signified and affirmed their unequivocal intention and willingness to submit and participate in the court proceedings in preference to arbitration. In my view, the issue thus is whether it can be concluded that Anas's conduct so far can be said to have evinced a similar intention.

[42] Learned counsel Mr Ong Yu Shin on behalf of Anas submits that this court has a duty to undertake an exercise of assessing the conduct of Anas to consider if they have taken a step in the proceedings. Reliance was placed on the decision of the Court of Appeal in the case of *Comos Industry Solution GMBH v. Jacob & Toralf Consulting Letrikon Sdn Bhd & Ors* [2011] 1 LNS 1770; [2012] 4 MLJ 573 and it was submitted that an application is not a step in the proceedings if it does not express a willingness to the matter being determined by the court instead of arbitration. In *Comos Industry Solution* (*supra*), the appellant there had applied to set aside the writ on the grounds that the local courts had no jurisdiction with an alternative prayer for leave to file a defence. The appellant subsequently filed an application to stay pending arbitration but such application was dismissed by the High Court on the basis that the earlier application to set aside were steps taken in the proceedings.

[43] In allowing the appeal, Jeffrey Tan JCA in the case of *Comos Industry Solution* (*supra*) held as follows:

> Held, allowing the appeal with costs:
>
> (1) An application is not a step in the proceedings, if it does not express the willingness of the defendant to go along with the determination of the courts instead of arbitration. A defendant who has specifically stated in the application or supporting affidavit that he intends to seek a stay is not estopped from asserting his right to invoke arbitration. An application, which is made in the event that the specific application for a stay is unsuccessful, is not a step in the proceedings (see para 14).

(2) ln the affidavit filed in support of encl. 41, the appellant openly reserved the right to refer the dispute to arbitration. Indeed, in all papers filed, the appellant unceasingly challenged the jurisdiction of the court below and reserved the right to refer the dispute to arbitration. Given the qualifications under which it was made, the prayer for time to file a statement of defence was only a precautionary step to obviate the risk of a judgment in default of pleadings, should prayer (a) in encl. 41 be refused. Here, encl. 41 never expressed the willingness of the appellant to go along with the determination by the courts and to abandon arbitration (see para 15).

(3) Enclosure 41 was not a step in the proceedings. The fact that other defendants applied but failed to set aside the writ could not be held against the appellant. There was a valid and binding arbitration agreement between the appellant and respondent, and the fact that the respondents had other defendants, should not impact on the right of the appellant to refer the dispute to arbitration (see para 16).

[44] The above decision of *Comos Industry Solution* (*supra*) was in fact considered by the Court of Appeal in *Kebabangan Petroleum* (*supra*) but it found that the facts were different and easily distinguished in that the application to set aside in *Comos Industry Solution* (*supra*) was on a procedural issue of jurisdiction which did not require an examination of the merits of the dispute as was required in *Kebabangan Petroleum* (*supra*).

[45] On my part, on this issue of taking a step in the proceedings, I find the decision of the Federal Court in the often-quoted case of *Sanwell Corp v. Trans Resources Corp Sdn Bhd & Anor* [2002] 3 CLJ 213; [2002] 2 MLJ 625 instructive. In that case, when considering if the entry of appearance amounts to a step in the proceedings, the Federal Court concluded that the legal position in Malaysia may be neatly summarised as follows:

... (2) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s. 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;

(3) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s. 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration;

(4) if he has taken any other action in the proceedings (other than steps (2) or (3) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.

[46] Having set out the principles enunciated in the cases above, the issue then is whether Anas have conducted themselves in such a manner that has indicated an unequivocal intention to proceed with the suit and to abandon a right to have the dispute disposed of in arbitration. Further, following the decision in *Kebabangan Petroleum* (*supra*), if encl. 6 requires a determination of the merits, that would amount to a step in the proceedings.

[47] In my considered view, having considered all matters and in particular the conduct of Anas, I cannot conclude that they have indicated an unequivocal intention to proceed with this suit and to abandon the right to have the dispute disposed of by arbitration. There are several reasons for my concluding as such.

[48] Firstly, it has to be borne in mind that from the very outset of the filing of the first civil suit by JKP, Anas had taken the position that the dispute ought to be disposed of in arbitration. This led to JKP withdrawing the first civil suit and proceeding to arbitration.

[49] Secondly, unlike the respondent in *Kebabangan Petroleum* (*supra*), Anas had actively participated in the arbitration proceedings. Whilst it may have lost the opportunity to prosecute its counterclaim there by virtue of refusing to pay its portion of the second deposit, they were clearly prepared to defend JKP's claim there.

[50] Thirdly, as seen above, as soon as Anas was served the statement of claim in this present suit, in their solicitor's cover letter serving the memorandum of appearance, express notice was given of the objection to the filing of this present suit and highlighted that the arbitral forum was the proper forum to decide the dispute as per cl. 66 of the said contract. In the said letter, Anas has also informed that they would be filing an application to strike out or a stay of proceedings. No further pleading were filed or served by Anas in this suit.

[51] Fourthly, and in my view, critically, although encl. 6 sought an order to strike out or alternatively stay the proceedings pending the arbitration, it did not require a determination of the merits. Like the facts in *Comos Industry Solution* (*supra*), a perusal of the application in encl. 6 will clearly reveal that such an application was procedural and preliminary on the ground that this court lacked jurisdiction and it did not require an examination of the merits. It only sought that the suit be struck off as being an abuse of process when considering the chronology of events of the previous first civil suit and the arbitration proceedings.

[52] A perusal of the prayers sought by Anas in encl. 6 and the affidavit in support of the same also clearly indicate that the prayer sought for striking out the present claim was solely based on the non-compliance with cl. 66 of

A the said contract which requires disputes to be determined *via* arbitration. This, in my view, did not invite the court to determine the merits of the case unlike the facts in the cases of *Kebabangan Petroleum* (*supra*) and *L Capital Jones* (*supra*).

B **[53]** In my considered view, the filing of the application under encl. 6 only sought for the writ to be struck out or stayed on the sole ground that this court lacked jurisdiction due to the arbitration agreement. Further, in the affidavit in support of encl. 6, Anas was unceasingly challenging the jurisdiction of this court. I have no doubt in my mind that the only intention that was so consistently evinced by Anas was that they were not prepared to proceed C with this present suit or to abandon their right to have the dispute disposed of by arbitration.

Conclusion

[54] In the final analysis, having concluded that the arbitration clause has D not been rendered inoperative and that Anas had not taken any steps in the proceedings, I grant order in terms of prayer 4 of encl. 6 and order that these proceedings be stayed pending arbitration.

[55] As for costs, I would order JKP to pay costs of RM4,000 to Anas subject to allocator.

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